1978

Shirley W. Adams v. Charles W. Adams : Brief of Defendant Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

STATE OF UTAH

SHIRLEY W. ADAMS)

Plaintiff and Appellant)

Case No. 15, 673

vs.)

CHARLES W. ADAMS)

Defendant and Respondent.)

BRIEF OF DEFENDANT RESPONDENT

Appeal from the Judgment of The
Fourth District Court of Utah County
Honorable J. Robert Bullock

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NATURE OF THE CASE

This is an action brought by the Plaintiff pursuant to the continuing jurisdiction of the District Court in a domestic matter, based on an Order to Show Cause issued by the Trial Court as to why the Defendant should not be ordered to pay alimony which had accrued and remained unpaid. Defendant objected to the Order to Show Cause, on the bases that Plaintiff was estopped from claiming any past due alimony, and requested the Trial Court to terminate Defendant's alimony obligation under the Decree.

DISPOSITION IN THE LOWER COURT

The District Court in its decision held that the Defendant erroneously but in good faith believed his alimony obligation to the Plaintiff had terminated at the time he obtained custody of his children in March 1972, thereafter, for a period of more

than five (5) years the Defendant did not pay alimony to the Plaintiff and no claim therefore was asserted by her against him until October 1977, at which time arrearages had accrued under the terms of the Decree in the amount of Seven Thousand Five Hundred and Ninety Dollars ($7,590.00).

The Court found that the Plaintiff knew or should have known within a few months after the children were awarded to the Defendant in March 1972, not exceeding six months, that the Defendant did not recognize any obligation to pay alimony, and at that time Plaintiff had the duty to inform the Defendant that she claimed alimony, if in fact she did so claim, and in equity and good conscious Plaintiff could not remain silent concerning her claim, thereby lulling Defendant into inaction with respect to seeking a modification of the Decree. Futhermore, the Court held that Plaintiff is estopped to claim alimony against the Defendant except as to any arrearages which had accumulated to the time the children were awarded to the Defendant in March 1972, and for six months thereafter. The Court also found that for good cause shown the Decree was to be modified reducing alimony to the sum of One Dollar ($1.00) per year.

RELIEF SOUGHT ON APPEAL

Respondent prays that the judgment of the Trial Court be affirmed and that a finding be made that the Trial Court did not abuse its discretion based upon the facts of this particular case, thereby affirming the Lower Court's decision and awarding Defendant his costs.

STATEMENT OF FACTS

The parties were married on May 13, 1954, and divorced on March 27, 1970. The Decree was modified on June 16, 1970, January 17, 1972, and March 31, 1972. The last modification awarded custody of the minor children of the parties to the Defendant and terminated the child support obligations.

From March 1972, until the time the action was initiated by the Plaintiff in October 1977, the Defendant paid no alimony. However, he did pay the sum of Seven Hundred and Seven Dollars and fifty cents ($707.50) which was a payment on a Judgment past due. Never during the five and a half year period from 1972 to 1977 did the Plaintiff make any claim against the Defendant for alimony she claimed was due and owing. The Defendant continued to reside in Utah County and made no attempt at all to avoid the Plaintiff and as a matter of fact had contacts with her during that period of time. (T., 12,13,14,15) The Defendant further testified that prior to March 1972 his former wife was constantly pursuing him if he became delinquent on the support and obligation payments. However, after March 1972, no effort at all was made to contact the Defendant with regard to the claimed alimony. (T., 11) The Defendant remarried in June 1973; purchased a home for him and his new family and has continued to reside in Utah County. (T., 11)

The Trial Court found that a substantial change of circumstances had occurred since the time of the last modification of the Decree to justify the reduction of alimony to the sum of One Dollar ($1.00) per year. In 1972 at the time the Divorce Decree was last

modified, the Plaintiff was unemployed. Since December 1972, she has been employed full time at the Utah State Training School in American Fork, Utah. With that full time employment she has been able to obtain income at the rate of Six Hundred and Thirty-Nine Dollars ($639.00) per month gross. (T., 18,19) Plaintiff does not have the responsibility of supporting anyone other than herself inasmuch as the children are living with their father and have been since March 1972. The Six Hundred and Thirty-Nine Dollars ($639.00) is allocated to her own private needs rather than for the support of any other individual. (T.,19)

ARGUMENT

POINT I

THE DOCTRINE OF ESTOPPEL MAY BE RAISED AS A DEFENSE TO PAYMENT OF ALIMONY WHEN THE HUSBAND RELIED UPON THE WIFE'S SILENCE OR FAILURE TO PURSUE HER CLAIM WHERE SHE HAD A LEGAL OR MORAL DUTY TO SPEAK.

Appellant cites several cases in support of her contention, and although the principles remain the same, application of those principles may differ since each of the cited cases is distinguishable on the facts.

In Openshaw v. Openshaw, 105 Utah 574, 144 P.2d 528 (1943) Defendant-Husband had raised no defense of estoppel and in fact the Trial Court invoked the doctrine of laches on behalf of the Defendant-Husband, not the doctrine of estoppel as was effectively asserted in the instant case. In Openshaw, the equities of the case clearly favored the Plaintiff-Wife since the Defendant had openly acknowledged that he owed alimony, had often tried to

the Court to reduce the amount, had been found guilty of contempt for not making the payments, and had tried to mislead the Court by fraud and deceit. In the case at hand, the equities are much more evenly balanced and the decision of the Trial Court should be looked on favorably.

Appellant urges that French v. Johnson, 16 Utah 2d 360, 401 P.2d 315 (1965), is A FORTIORI to the instant case. French involved a default in child support payments, and because of the distinct nature of the child support obligation, the respondent feels French is not A FORTIORI to the instant case, especially since in French this Court looked very heavily at the parental responsibility, and in the three to two decision, the dissent would have released the father from the child support decree even though he had the moral parental obligation. However, French did rely on a principle which is concededly applicable to the instant case: "Mere silence over a period of time will not raise an estoppel where there is no legal or moral duty to speak". (Id. p315). In the instant case, the Trial Court did find a legal or moral duty to speak on the part of the Appellant, and considering the particular facts of the situation, the Trial Court appropriately used its discretion to so find.

Baggs v. Anderson, 528 P.2d 141 (1974), again involves child support payments which differ distinctively from alimony partially because the right to receive child support payments is held by the children and cannot be estopped by actions of the parents, especially in Baggs where the claimed estoppel was based to a considerable extent upon conduct and statements of a third party. Baggs is a case dealing with general estoppel principles

which are, if looked at in light of the peculiar facts, applicable to the instant case.

This Court held in Utah State Building Commission v. Great American Indemnity Company, 105 Utah 11, 140 P. 2d 763 (1943), that mere inaction or silence may, under peculiar circumstances, amount to both misrepresentation and concealment which may amount to an estoppel. The two caveats of that decision are that the Plaintiff must have a right to speak but did not exercise that right, and that there must be a duty on the part of the Plaintiff to speak. Clearly the Plaintiff in the instant case had a right to speak and did not do so for over five years, and clearly it is the Plaintiff's duty to assert her claim for alimony, not the duty of anyone else to claim for her.

This Court, in Larsen v. Larsen, 5 Utah 2d 224, 300 P.2d 598 (1956), held that:

> " Where the father's failure to make such payments was induced by her representations or actions" (such as silence, 28 AmJur 2d, Estoppel and Waiver §53) "and where as a result of such representations or actions the father has been lulled into failing to make such payments and into changing his position which he would not have done but for such representations, and that as a result for such failure to pay and change in his conditions it will cause him great hardship and injustice if she is allowed to enforce the payment of such back installments, she may be thereby estopped from enforcing the payment of such back installments." (p.598)

This Court may use the principle setforth in Larsen to avoid the great hardship that would result by now forcing the Respondent to make such payments after having been lulled into not making payments through the Appellant's failure to assert her right

thereto.

By way of analogy, if a divorced wife is not claiming reimbursement for expenses and has, in fact, supported herself and has received support from a second husband, then estoppel will be allowed. Wasescha v. Wasescha, 548 P. 2d 895 (Utah, 1976). Although the Wasescha decision depended heavily on the wife's remarriage, the same reasons for looking at remarriage apply here. The Appellant has supported herself and has not found it necessary to rely on the Respondent for over five and a half years, so that the Trial Court was within its discretion to find that estoppel should apply especially when the claim would operate to create injustice and undue burden.

This principle has been affirmed by this Court, by Mr. Justice Crockett concurring in Wallis v. Wallis, 9 Utah 2d 237, 342 P.2d 103 (1959), and subscribed to by this Court in Peterson v. Peterson, 530 P.2d 821 (Utah 1974):

> "The purpose of the provision for alimony and support money is to provide for the current needs, and not to allow the beneficiary to sit by and permit a burdensome debt to accumulate and then use it to harass the defendant so that he cannot hold a job or live a respectable existence."

The Trial Court has not abused its discretion in its Findings of Fact and it has conscientiously applied principles of law to the particular facts of this case in an equitable fashion. None of this Court's previous decisions will be adversely affected by upholding this decision. Estoppel has been found based on silence with a duty to speak and on the balancing of equities of this case.

Each statute of limitations already imposes a duty to pursue a cl within a given time period or risk losing that claim. It is already the duty of the claim-holder to pursue and enforce that claim. Upholding this case will not extend any statute of limitations or create any new duties, but will recognize the equities of this particular fact situation and will reaffirm the duty of the Trial Court to use educated discretion.

POINT II

THE EQUITABLE DOCTRINE OF ESTOPPEL SHOULD BE ALLOWED TO APPLY SO AS TO BEST FIT THE NEEDS OF A PARTICULAR SITUATION.

Respondent agrees with the equitable principle urged on the Court by the Appellant, but feels that application of this principle will not alter the result in this case and that perhaps application of this principle is not even appropriate. The principle is thus articulated by the United States Supreme Court.

> "Where one of two innocent persons must suffer a loss, and one of them has contributed to produce it, the law throws the burden upon him and not upon the other party". Pompton v. Cooper Union, 101 U.S. 196 (1879)

This Court said in Valley Bank and Trust Co. v. Gerber, 528 P.2d 1121 (1974):

> "Ordinarily, where one of two innocent parties must suffer a loss it should be borne by the one whose conduct created the circumstances which permitted the loss to occur. But here there are other and more important considerations which provide the controlling solution to the problem confronted here".

Appellant construes the facts to find that the Respondent

is the party through whose agency the loss occurred. In this situtation it appears equally possible to construe the facts so that the Appellant is the responsible party, or perhaps that neither party carries any more responsibility than the other.

Appellant contends that the Respondent "must have or should have known that the burden to further modify the Decree regarding alimony payments was also his burden," but it is just as easy to suppose that the Respondent thought he was modifing the entire Decree when he modified the child support payments. Since the nature of alimony is often a little unclear even to experienced members of the bar, then why should we assume that the Respondent had any better understanding of the relation of alimony to child support. In fact, he testified that he thought the Decree had ended any obligation he had to her. (T., 8,9)

Appellant further asserts that any loss could not have occurred through her agency because she was not even present for the Decree modification, and that she made no representations concerning discontinuance of alimony payments. One might wonder why Appellant was not present at that time and why she waits for more than five years to bring her claim for back payments. Previous to the Decree, the Appellant hounded the Respondent continually for support payments, and then for five years was silent. (T.,8,9) As Appellant points out, reasons and motivations for the actions of the two parties is largely a matter of conjecture. Respondent feels that identifying the party through whose agency the loss occurred is not nearly as simple as Appellant seems to believe, and that in this case the Court should affirm the decision of the Trial Court as it decided with discretion looking at all the facts.

The nature of the doctrine of estoppel extends beyond simpl principles. This Court in Petterson v. Ogden City, 11 Utah 125, 176 P.2d 599 (1947), used another principle which may contrast with the one urged upon the Court here. This Court stated:

> "Both laches and estoppel are bars which in certain circumstances may be raised to defeat a right or claim a party otherwise would have. The Courts refuse to give their aid to the party who has slept on his rights or who because of his actions or inaction when it is required was not fairly entitled to relief. (p. 604)

And as was stated in American Jurisprudence, 28 Am Jur 2d, Estop and Waiver §28, and applied in an Idaho case, Dalton Highway Dis of Kootenai County v. Sowder, 401 P.2d 813 (Idaho, 1965):

> " Since, however, the principle that underlies equitable estoppel in its proper sense runs throughout all the transactions and contracts of civilized life, such estoppels cannot be subjected to fined and settled rules of universal application, like legal estoppels, or hampered by the narrow confines of a technical rule."

Respondent urges that the Trial Court was within its discre to apply the principles of equitable estoppel as it saw the par ular eqities and should therefore be supported in its decision.

POINT III

A PARTY MAY BE ESTOPPED FROM CLAIMING PAST DUE INSTALLMENTS OF ALIMONY AWARDS.

Appellant totally misconstrues the action of the Trial Co as retroactively modifying the alimony award when in fact it estopped the Appellant from claiming past due alimony payment and only prospectively modified the award.

While the general rule appears to be that alimony wards c not be retroactively modified, even if no estoppel was found, could have been particular facts which would allow the Court t

apply an exception to the general rule. It is commonly accepted that subsequent remarriage of the wife will terminate the husband's support obligation to her. Kent v. Kent, 28 Utah 2d 34, 497 P.2d 652 (1972); Austad v. Austad, 2 Utah 2d 49, 269 P.2d 284 (1954). While the wife's remarriage did not occur in this case, it points out that there must be exceptions to any general rule when there are equities involved. The basis for the exception of terminating the husband's obligation when the wife remarries is that she has acquired support from another source and it would not be equitable for her to receive support from two sources. (Austad, Id. p. 288). Many of the former notions concerning alimony are being dissipated as we come to realize that women can be self-sufficient and that there is little basis for giving women an inalienable right to support from their former husbands. In 1954, District Judge Hoyt, in his concurring opinion in Austad v. Austad, Id. p. 292, said:

> "Certainly it is unjust to compel a husband to continue to support a divorced wife who has remarried and has adequate support from another husband. But other situations also come before the courts where it is inequitable to compel a divorced husband to pay accrued installments of alimony or of support money for support of children in accordance with the terms of a divorce decree. If a divorced wife, who has been awarded custody of children and an allowance from the husband for their support, thereafter deserts the children and they are taken over and cared for by the husband, it is clearly desirable and equitable to relieve him of payment of support money from the date of such desertion. Why should it be held that the court has no power to do equity in such a situation? If it so happens, as it very often does, that the divorced husband fails to apply promptly to the Court for modification of the decree, shall we say that he must therefore pay the installments ordered to be paid up to the date of the order of modification, or as some courts have said, up to the date of his application for modification? Should the court put such a penalty of lack of vigilance? I believe not."

Judge Hoyt also pointed out that the statute cited by the Appellant, Utah Code Annotated §30-3-5 (1953), places no restrictions on retroactive modification, and in fact the statute authorizes changes as are reasonable and necessary.

An alimony award that is not allowed to be modififed according to the equities of the particular situation would assume the character of a punishment. There would be no purpose in enforcing past due installments of alimony when the wife has already supported herself adequately.

Estoppel has been accepted as an equitable principle that may be applied to cases such as this. Larsen v. Larsen, supra. The Trial Court appropriately used its discretion in applying estoppel to this case and its decision should not be disturbed.

POINT IV

PROOF OF CHANGED CONDITIONS ARISING SINCE THE LAST MODIFICATION OF THE DECREE CAN BE SUFFICIENT TO JUSTIFY A REDUCTION OF ALIMONY.

Appellant contends that no adequate change of circumstances is present in order to justify a reduction of alimony. The Trial Court found that there was a significant change of circumstances since the entry of the Decree (Findings of Fact #8), and based that finding it reduced the alimony to $1.00 per year which still allows the Court to maintain jurisdiction over the matter.

The Court's comment as cited by the Appellant (T.,25) concerning the Appellant no longer having custody of or obligation for the children, does not necessarily mean that that was the fact on which the Trial Court based its decision. In reviewing

the evidence, it could easily have decided to reduce the alimony based on the Appellant's increased earning capacity and self-suffience, and on the remarriage of the Respondent and his establishing a home for the four children.

The Trial Court's finding must be looked at in a light most favorable to the Respondent, and its exercise of discretion according to the equities of this case must be given deference and the modification allowed to stand.

POINT V

PLAINTIFF-APPELLANT IS NOT ENTITLED TO ATTORNEY'S FEES EITHER ON THE APPEAL OR AT TRIAL BELOW.

At common law, attorney's fees were not recoverable by either party, and this Court has repeatedly held that attorney's fees are not awardable where there is no statutory sanction therefor or where there is no agreement between the parties. Hawkins v. Perry, 123 Utah 16, 253 P.2d 372 (1953); C.G. Horman Co. v. Lloyd, 28 Utah 2d 112, 499 P.2d 124 (1972); Stubbs v. Hemmert, 567 P.2d 168 (Utah, 1977).

Attorney's fees on appeal are said to be discretionary with this Court and then only when specifically authorized by statute or rule of court. Downey State Bank v. Major-Blakeney Corp., 556 P.2d 1273 (Utah 1976); Swain v. Salt Lake Real Estate and Investment Co., 3 Utah 2d 121, 279 P.2d 209 (1955).

Bates v. Bates, 560 P.2d 706 (Utah 1977) announces what may be construed as a rule of court, but would only apply where the order of the Trial Court is patently erroneous. Repsondent urges

that that is not the case here, that the facts in this case are in no way comparable to those in Bates, and that the Trial Court in this case was well within its discretion to apply the rule of equity to the facts as it saw them, and that in this case the Appellant is not entitled to attorney's fees, either on this Appe or at the hearing below.

CONCLUSION

The Defendant respectfully submits that the Trial Court did not abuse its discretion in arriving at its findings. Total examination of all of the evidences in light of the circumstances surrounding each of the parties with the consideration of what is fair and equitable to the parties herein can very well allow this Court to find that the Trial Court acted within its discret and acted properly in arriving at its decision and therefore the same should be affirmed.

DATED and SIGNED this 23 day of May, 1978.

RESPECTFULLY SUBMITTED,

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MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing Brief of Defendant-Respondent to C. J. Jaussi, attorney for Plaintiff-Appellant, 424 South State Street, Orem, Utah 84057, postage prepaid this 24th day of May, 1978.

Shirley Reynolds
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